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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1955

No. 355

LAWRENCE P. BARDIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner, Lawrence P. Bardin, defendant-appellant in the court below, petitions this Court to issue its writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this cause on June 3, 1955, affirming the judgment of the United States District Court for the Southern District of Indiana, Indianapolis Division, entered in this cause on May 22, 1953.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit, not as yet reported, is appended hereto as Appendix A. The District Court rendered no opinion in this cause.

JURISDICTIONAL STATEMENT.

On September 12, 1952 the United States Grand Jury for the Southern District of Indiana, Indianapolis Division, returned its indictment in two counts, each of which purported to charge petitioner with separate violations of 26 U.S.C. §145(b) (1952), *i.e.*, the willful and knowing attempt to defeat and evade income tax due and owing by petitioner to the United States of America for the calendar year 1946. (D.C. Tr. 2, 3.)[1]

On May 22, 1953, the jury to which petitioner was tried returned its verdict, finding petitioner guilty as charged in each count of the indictment. (D.C. Tr. 30.) Thereupon the District Court entered judgment in which it sentenced petitioner to imprisonment for a term of four years under each count, the sentences to run concurrently. (D.C. Tr. 35, 36.)

The judgment of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the District Court, was entered on June 3, 1955. (C.A. Tr. 2; see, Appendix B hereto.) On June 22, 1955, and within time al-

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[1] This cause was considered by the Court of Appeals upon the original typewritten record. As certified by the Clerk of the Court of Appeals the record is in four distinct parts which have been individually paginated. The existing pagination will be referred to in this petition as follows: (1) District Court Transcript (D. C. Tr.); Transcript of Testimony (Tr. Test.); Transcript of Closing Arguments to Jury (Tr. Arg.); Court of Appeals Transcript (C. A. Tr.).

lowed by the Court of Appeals, petitioner filed with that Court his petition for rehearing, which was denied on July 1, 1955. (C.A. Tr. 3.)

This Court has jurisdiction to review the judgment in question by writ of certiorari under the provisions of 28 U.S.C. §1254(1) (1952).

Following the order entered by the Court of Appeals on July 1, 1955, denying petitioner's petition for rehearing, this petition for writ of certiorari was, under the provisions of Rule 37(b) of the Federal Rules of Criminal Procedure and Rule 22 of the Rules of this Court, due on July 31, 1955. However, on July 26, 1955, Honorable Sherman Minton, Associate Justice of this Court, entered an order extending the time within which petitioner might file this petition for writ of certiorari to and including August 30, 1955. This petition is filed within the time allowed by said order. (Appendix F hereto.)

THE QUESTION PRESENTED FOR REVIEW.

The question presented for review is: was not petitioner's right to a fair trial, guaranteed by the due process clause of the Fifth Amendment to the Constitution of the United States, abridged by:

(a) The United States District Court permitting the government to call and interrogate at length a witness closely associated with petitioner in the commission of the alleged crime, it being known to the court and the government that the witness intended to invoke his privilege against self-incrimination; and

(b) the government attorney, in the rebuttal portion of his closing argument to the jury, linking petitioner to the silent witness, and then urging the jury to consider the witness' refusal to testify in their deliberation upon the guilt of petitioner?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Amendment V to the Constitution of the United States is involved in this cause insofar as it provides "No person shall . . . be deprived of life, liberty or property without due process of law; . . ."

Also involved insofar as it defined the crime with which petitioner was charged is 26 U.S.C. §145(b) (1952), which provides in material part: ". . . any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall . . . be guilty of a felony. . . ." (See, Appendices D and E hereto.)

A STATEMENT OF THE CASE.

On September 12, 1952, the United States Grand Jury for the Southern District of Indiana, Indianapolis Division, returned its indictment in two counts, the first of which charged that defendant had willfully and knowingly attempted to defeat and evade income tax due and owing by him to the United States of America for the calendar year 1946 by filing a false and fraudulent income tax return, wherein he stated his income for said calendar year was $528,824.56 with a tax due and owing thereon of $426,382.89, whereas he then and there knew his income for the calendar year 1946 was the sum of $759,827.94, upon which he owed a tax of $639,841.28, in violation of 26 U.S.C. §145(b). Count II charged that from "September 15, 1946, through and including May 26, 1947" petitioner had "willfully and knowingly attempted to defeat and evade the payment of income tax due and owing by him to the United States of America for the calendar year 1946 by concealing and attempting to conceal from the Collector of Internal Revenue the nature and extent of his assets and the location thereof, said tax being $639,841.28,

more or less, by refusing to pay said tax due and owing, and at said times having funds with which to pay said tax all in violation of 26 U.S.C. §145(b)." (D.C. Tr. 2, 3.)

The government was unable to prove by direct evidence that defendant had understated his income or had received income upon which a tax was due and owing in the amount charged in the indictment. Accordingly, it turned to the currently popular circumstantial substitute for such direct proof, the so-called net worth-expenditure method of establishing taxable income.

Of critical importance to the government's case was the ownership and management of the Indianapolis Brewing Company. The importance of this ownership and management stemmed from the burden imposed upon the government to establish (1) a source from which petitioner had received the income attributed to him by the allegations of the indictment, and (2) an increase in petitioner's closing net worth over beginning net worth of approximately $750,000.00.

Regarding the first of these burdens, as above stated, the government urged that petitioner had owned and managed the brewing company during the year 1946; that in such position of management he had engaged in the sale of large quantities of beer manufactured by the company, at prices in excess of then existing OPA ceilings; had received these overpayments in cash, which he retained; and had failed to fully report these payments in his 1946 income tax return. (Tr. Arg. 7, 8.)

Regarding the second of the aforementioned burdens, the government sought the inclusion in petitioner's final net worth, of 2,953½ shares of the capital stock of the Indianapolis Brewing Company, they being all of the issued and outstanding shares of the company. (Tr. Test. 71; Tr. Arg. 10.) To this stock was ascribed a value of $476,000, the

amount shown to have been paid for all of the shares during the latter part of 1945 and the year 1946. (Tr. Test. 74.) At that time, record and legal title to the stock had been transferred from 12 shareholders to petitioner's brother, Alvin Bardin. (Tr. Test. 74; 534, 535.)

Alvin Bardin had made the initial payment, $35,000 (Tr. Test. 74), for the stock and had sold his holdings in two other breweries (situated in Eulberg and Denmark, Wisconsin) in order to raise another payment of $180,000. (Tr. Test. 74, 75.) However, it was the government's thesis that petitioner had been the beneficial owner of all the stock; had, therefore, controlled the company during 1946; and that the stock was properly included in petitioner's final net worth. (Tr. Arg. 10, 49.)

Seemingly to establish its theory of beneficial ownership the government called as a witness the asserted nominee, Alvin Bardin. (Tr. Test. 272.) Following certain preliminary questions (Tr. Test. 272-76), during which it was established that the witness was petitioner's brother, the following question was asked by the government: "Calling your attention, Mr. Bardin. to the fall of 1945, were you present in Indianapolis, Indiana, with your brother, the defendant in this case, Lawrence P. Bardin, negotiating the purchase of the Indianapolis Brewing Company?" (Tr. Test. 276.) To which the witness replied: "I refuse to answer that question on the grounds that the answer may incriminate me." (Tr. Test. 276.)

The witness was then asked: "Mr. Bardin, were you the owner of the Indianapolis Brewing Company in 1946?" (Tr. Test. 276.) To which the witness replied: "I refuse to answer that question on the ground that the answer may incriminate me." (Tr. Test. 276.)

Thereupon the jury was excused. (Tr. Test. 277.) The attorney for the government suggested that the witness be temporarily excused; that the government submit pro-

posed questions to the witness for his consideration and study overnight; that the witness be recalled as a government witness the following day, before which time counsel (who had appeared specially to represent the witness) could advise the witness as to what position to take in answering further questions. (Tr. Test. 277.) The trial court approved this procedure. (Tr. Test. 277.)

The following morning the witness, Alvin Bardin, was recalled as a government witness. (Tr. Test. 315.) The trial court inquired as to whether the government intended to proceed in the presence of the jury, to which inquiry the government replied in the affirmative. (Tr. Test. 315-16.) Thereupon, following a re-reading of the last two questions and answers of the witness from the preceding day, and certain preliminary questions re-identifying him (Tr. Test. 316), the following questions were asked by the government, to all of which the witness invoked his privilege against self-incrimination, all in the presence of the jury (Tr. Test. 316-319):

1. "Mr. Bardin, do you have any knowledge regarding the circumstances surrounding the purchase of the Indianapolis Brewing Company in 1945?"

2. "Mr. Bardin, do you have any knowledge as to how the purchase in 1945 of the Indianapolis Brewing Company was financed?"

3. "Do you have any knowledge as to who were the stockholders of the Indianapolis Brewing Company after the purchase in 1945?"

4. "What, if anything, Mr. Bardin, did you have to do with the management and operation of the Indianapolis Brewing Company in 1946?"

5. "Who had possession, if you know, of the company's stock certificates of the Indianapolis Brewing Company in 1946?"

6. "How many times, if at all, Mr. Bardin, and for what period of time were you here in Indianapolis in 1946?"

7. "Were you down here in Indianapolis at all in 1946, if you recall?"

8. "What, if any knowledge, Mr. Bardin, did you have in 1946 as to any over-ceiling sales of beer by the Indianapolis Brewing Company in 1946?"

9. "State whether or not, Mr. Bardin, that you ever collected any money on behalf of the Indianapolis Brewing Company in 1946?"

10. "What, if any, bank account did you have here in Indianapolis in 1946?"

11. "What, if any, powers of attorney did you execute in 1945 or 1946 with reference to any bank accounts here in Indianapolis?"

12. "What if any powers of attorney did you execute in 1945 or 1946 with reference to stock certificate sales of Indianapolis Brewing Company?"

13. "Did you at any time in late 1945 or 1946 have any conversations with the defendant, Lawrence P. Bardin, relative to the purchase and ownership of the Indianapolis Brewing Company?"

14. "Were you connected with some breweries in Wisconsin during the years 1945 and 1946?"

Thereupon the jury was excused. (Tr. Test. 320.) There followed a hearing before the Court during which testimony was heard (Tr. Test. 321-343) which established that the witness, Alvin Bardin, had been investigated by the Bureau of Internal Revenue regarding his income for the year 1946. The witness, through his specially appearing counsel, and the government argued the validity of the witness' assertion of his privilege against self-incrimination. (Tr. Test. 344-350.) Petitioner, Lawrence P. Bardin, did not participate in this hearing.

The trial court sustained the witness. (Tr. Test. 352.) In so doing, the Court said:

> "There has been a question in the mind of the Court throughout this proceeding as to why there has not been a conspiracy count brought against the brother, and perhaps even other officials of the company [*i.e.*, the Indianapolis Brewing Company]. The Court feels that viewing this entire matter as a whole, the brother, Alvin, is so intertwined, his activities were so intertwined and interrelated to those of the defendant, Lawrence Bardin, that they are almost inseparable in many instances. I have drawn that from the evidence in this case." (Tr. Test. 350.)

During the rebuttal portion of his closing argument to the jury, the United States Attorney said (Tr. Arg. 49-50):

> ". . . I told you at the outset of this case that we knew legal title was in the name of Alvin Bardin, and we have never contested that. And yet that is all they can talk to you about—this was Alvin's brewery and now the two people that know most about whose brewery this was, are the defendant and Alvin Bardin.
>
> "The Judge will instruct you that the defendant in the criminal case has no obligation to testify, so we brought to you the man who knew the most about who owned this brewery, Alvin Bardin; and before this court and jury he exercised his privilege under the Fifth Amendment of the Constitution not to tell you. Why did he do that? I will let you decide that."

To this line of argument defendant's counsel objected upon the ground that the government had no "right to try to prejudice this defendant or prejudice this jury to this defendant because the witness exercises his constitutional right." (Tr. Arg. 50.) Upon this objection, the Court ruled, "I will sustain the objection." (Tr. Arg. 50.) Thereupon the United States Attorney stated: "Disregard any reference that I made of the failure of the witness to testify." (Tr. Arg. 50.)

On May 22, 1953, the jury to which petitioner was tried, returned its verdict of guilty. Thereupon the District Court entered judgment from which petitioner appealed, assigning as error, *inter alia*, the occurrences hereinbefore recited.

A divided Court of Appeals refused to consider the alleged error for the reason that the trial court had granted defendant all of the relief he had there sought, *i.e.*, had sustained his objection to the government's argument. Thus, Judge Schnackenberg, writing for the majority said:

> "Defendant cannot now in this Court be permitted to capitalize on his counsel's failure to press for further action by the trial court." (Appendix A, pp. 4, 5.)[2]

In so holding the Court of Appeals overlooked the fact that at trial petitioner was represented by court-appointed counsel (D.C. Tr. 13) who withdrew from the cause immediately after the entry of the District Court's judgment.[3] Thus petitioner was left to his own devices regarding post-trial motions.

It is the judgment of the Court of Appeals for the Seventh Circuit which petitioner now asks this Court to review by the issuance of its writ of certiorari.

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[2] Opposed to this was the language of Judge Finnegan in dissent:

> "Falling back on defendant's failure to object or request an instruction, the prosecution would have us ignore this episode. Though its argument suggests some super-technical credit it reveals a robust disregard of human nature in the jury box. Moreover, defendant's case was interlaced with alleged financial relationships between the brothers Bardin. Consequently, the government attorney's generous remarks only served to underscore the prosecution's point and cut ground from under the man on trial." (Appendix A, p. 29.)

[3] On May 28, 1953, petitioner, appearing **pro se**, filed his notice of appeal. (D.C. Tr. 38, 39.) On July 3, 1953, petitioner filed with the District Court an affidavit in support of his petition for leave to appeal **in forma pauperis** in which he declared that he had "not been represented by counsel since trial." (D.C. Tr. 45.) It is interesting to note that in this affidavit petitioner stated as a ground for appeal the conduct herein complained of. (See, para. 2, D.C. Tr. 46.)

ARGUMENT.

Foreword.

Although this petition for writ of certiorari has as its background a criminal prosecution for alleged evasion of income taxes, petitioner does not seek review of questions peculiar to that crime. Thus, while there is considerable doubt as to the sufficiency of the proof relied upon by the government to establish petitioner's beginning net worth,[4]

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[4] Compare the following language of the Court of Appeals in holding sufficient the government's proof of petitioner's beginning net worth:

> "He [petitioner] filed no returns prior to 1942. According to income tax returns filed with the Internal Revenue Collector, the defendant and his wife had a total income of $3,861.15 and net income of $2,311.15 for the year 1942. For 1943 they had a total income of $12,067.25, and a net income of $1,602.25. For the next two years, defendant alone reported as follows:
>
> | Year | Gross Income | Net Income |
> |---|---|---|
> | 1944 | $8,314.85 | None |
> | 1945 | 8,196.15 | $3,873.30 |
>
> These figures tend to show that defendant's income during the prior years was insufficient to have enabled him to save orate the relatively low figure set by the government as deany appreciable amount of money, and thus tend to corrobfendant's beginning net worth. **Holland v. United States, supra,** at 133."

with the following language of this Court in **United States v. Calderon,** 348 U. S. 160 (1954) at page 165:

> "The only evidence of defendant's fortunes between 1935 and 1946, the first prosecution year, consists of his tax returns for 1944 and 1945 and some meager evidence with regard to his tax returns for 1941, 1942 and 1943. The latter apparently was obtained from the respondent, and, standing uncorroborated, cannot serve to corroborate respondent's other admissions. The 1944 and 1945 returns show net taxable income of $4,162 and $7,328, respectively, with gross receipts from the coin machines of $9,266 and $10,302. **This sketchy background can hardly give rise to an inference that defendant had no more cash at the starting date than the Government gave him credit for.**
>
> **"Accordingly, we must search for independent evidence which will tend to establish the crime directly without resort to the net worth method."** (Emphasis aded.)

and the sufficiency of the allegations of Count II of the indictment to charge a felony under old §145(b) of Title 26 U.S.C., rather than a misdemeanor under old §145(a),[5] petitioner seeks the writ to correct an error of paramount importance because of its effect upon the prosecution of crimes generally.

Reported decisions reveal that the several Courts of Appeals are being called upon with recurring frequency to consider and approve criminal prosecutions in which the government has called as a witness a person intimately associated with the defendant and, in the presence of the jury, elicited from the witness the exercise of his privilege against self-incrimination. See, *e.g.*, *Weinbaum* v. *United States* (C.A. 9, 1950), 184 F. 2d 330; *United States* v. *Hiss* (C.A. 2, 1950), 185 F. 2d 822, cert. den. 340 U.S. 998; *United States* v. *Augustine* (C.A. 3, 1951); *United States* v. *Amadio* (C.A. 7, 1954), 215 F. 2d 605, rev'd on other grounds, 348 U.S. 892 (1954). However, in each of these cases it appeared: (1) That the government was not aware of the witness' intended exercise of the privilege

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[5] Count II of the indictment charged petitioner with the willful and knowing attempt to defeat payment of income tax due and owing by him for the year 1946 "by concealing and attempting to conceal from the Collector of Internal Revenue the nature and extent of his assets and the location thereof . . . by refusing to pay said tax due and owing and at times he having funds with which to pay said tax . . ." Old §145(a) of Title 26 U.S.C. defined as a misdemeanor the willful failure "to pay such estimated tax or tax" or the willful failure to "supply any information" pertaining to the computation, assessment and collection of a tax due and owing. Thus, it appears that Count II charged petitioner with two misdemeanors the combination of which this Court has held in **Spies v. United States**, 317 U.S. 492 (1942) do not constitute a felony. Accordingly, the prosecution under Count II may have been barred by the three-year Statute of Limitations, 26 U.S.C. §3748(a) (1952).

until he was called to the stand; (2) the government made no affirmative attempt to impute the witness' fear of incrimination to the defendant; (3) the trial court, having extended the privilege to the witness, immediately and *sua sponte* instructed the jury to disregard the matter in their deliberations. Nevertheless, in the light of these decisions and recent public opprobrium attached to the use of the privilege, it seems fair to predict that the tactic, coupled with the comment here employed by the United States Attorney, will become an increasingly popular weapon in the prosecutor's arsenal in all cases where investigation reveals that the defendant was associated with another in the commission of the alleged crime.

However, petitioner believes that, when the witness is called to the stand with the knowledge of court and prosecutor that he intends to exercise his privilege, and thereafter the prosecutor affirmatively employs against the accused the witness' reluctance to incriminate himself, an applicable decision of this Court, decisions from other circuits, and the unanimous authority of state courts, dictate that the defendant be granted a new trial. Accordingly, petitioner presents the following reasons for this Court to exercise its discretion and issue its writ of certiorari to review the judgment of the Court of Appeals.

I.

The Court of Appeals decided the question presented in a way in conflict with an applicable decision of this Court.

In *Johnson* v. *United States,* 318 U. S. 189 (1943) the defendant in a criminal case, having taken the stand in his own behalf, was erroneously permitted by the trial court to invoke his privilege against self-incrimination as

to certain questions asked by the United States Attorney on cross-examination. Thereafter, the United States Attorney, during closing arguments to the jury, commented upon the defendant's exercise of his privilege. This Court issued its writ of certiorari to review the judgment of the Court of Appeals for the Third Circuit which had affirmed a judgment of conviction. In holding that the conduct of the United States Attorney was improper this Court, speaking through Mr. Justice Douglas, said, at pages 196, 197 and 199:

> ". . . where the claim of privilege is asserted and unqualifiedly granted, the requirements of fair trial may preclude any comment. That certainly is true where the claim of privilege could not properly be denied. The rule which obtains when the accused fails to take the stand (*Wilson* v. *United States*, 149 U. S. 60) is then applicable. As stated by the Supreme Court of Pennsylvania, 'If the privilege claimed by the witness be allowed, the matter is at an end. The claim of privilege and its allowance is properly no part of the evidence submitted to the jury, and no inferences whatever can be legitimately drawn by them from the legal assertion by the witness of his constitutional right. The allowance of the privilege would be a mockery of justice, if either party is to be affected injuriously by it.' *Phelin* v. *Kenderdine*, 20 Pa. 354, 363; *Wireman* v. *Commonwealth*, 203 Ky. 57, 62-63, 261 S.W. 862. And see *State* v. *Vroman*, 45 S.D. 465, 473, 188 N.W. 746; *Carne* v. *Litchfield*, 2 Mich. 340; *People* v. *McGungill*, 41 Cal. 429. We also think that the same result should obtain in any case where the court grants the claim of privilege and then submits the matter to the jury, if that action may be said to affect materially the accused's choice of claiming or waiving the privilege and results in prejudice. The fact that the privilege is mistakenly granted is immaterial.
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> • • •
>
> ". . . the responsibility for misuse of the grant of the claim of privilege is the court's. It is the court to

whom an accused properly and necessarily looks for protection in such a matter. When it grants the claim of privilege but allows it to be used against the accused to his prejudice, we cannot disregard the matter. That procedure has such potentialities of oppressive use that we will not sanction its use in the federal courts over which we have supervisory powers."

The instant trial points up graphically the "potentialities of oppressive use" which this Court foresaw in the *Johnson* case. Here petitioner had no control whatsoever over the government's use of the witness, Alvin Bardin. Petitioner could not object to the government calling and interrogating the witness for the privilege was that of the witness, not petitioner.[6] As the witness did not testify on direct examination, he could not be cross examined by petitioner. Thus petitioner was unable to prevent or dispel the atmosphere of guilt which was caused by the reluctance of the witness to incriminate himself, and in which the government attorney urged the jury to deliberate upon petitioner's guilt.

Petitioner submits that the opinion of this Court in the *Johnson* case required the Court of Appeals here to reverse the judgment and remand the cause in order that petitioner might enjoy a fair trial, free of the misconduct of the United States District Attorney. Accordingly, this Court should now issue its writ of certiorari in order to assure that the salutary principles of the *Johnson* case retain their vitality.

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[6] The trial court seemingly misapprehended the nature of the privilege, for in sustaining the witness he commented, ". . . the Court is going to allow the witness to exercise immunity against testifying, as much as I hate to do so. The Court feels compelled to do so. **I would rather not have any errors in the record of this rather long and expensive case.**" (Tr. Test. 352; emphasis added.)

II.

The Court of Appeals decided the question presented in conflict with a decision of the Court of Appeals for the District of Columbia on the same matter.

In *Billeci* v. *United States* (C.A.D.C., 1950) 184 F. 2d 394, the defendant was prosecuted for and found guilty of illegal gambling. The government, during the course of the trial, called witnesses who refused to testify on the ground that they might incriminate themselves. During his argument to the jury the prosecutor urged that the jury surmise the testimony of the reluctant witnesses would have been "damaging to the defendant's case". On appeal the Court of Appeals for the District of Columbia reversed, saying at p. 398:

> "If the prosecution puts a witness on the stand and the witness refuses to testify because his answer might incriminate him, the jury cannot infer that his testimony, if given, would be adverse to the defendant. The witness has a constitutional right not to testify if the testimony would incriminate him, but the possible guilt of the witness is not inferrable to the defendant. Such an inference without more support would be no more than speculation. . . .
>
> "We think that the correct rule is that, when a witness declines to answer a question on the ground that his answer would tend to incriminate him, that refusal alone cannot be made the basis of any inference by the jury, either favorable to the prosecution or favorable to the defendant. The witness in such an incident is exercising a constitutional right personal to himself. That exercise, without more, should not be to the harm of someone else."

On a much earlier occasion a federal appellate court had occasion to consider this question. In *Beach* v. *United States,* 14 Sawy. 459, 46 Fed. 754 (Cir. Ct. Cal., 1890) Mr. Justice Field, sitting on the circuit, had before him the following situation:

In a criminal case, a witness for the government refused to answer certain questions on the ground that he might incriminate himself. The District Attorney in his argument to the jury urged that the witness had invoked the privilege not to save himself but rather to protect the defendant. On appeal a judgment of conviction was reversed. Justice Field, noted that the right was that of the witness and the defendant had no control thereover. Thus it would have been a shocking injustice for the defendant to be convicted because of a witness' invocation of a privilege personal to himself. Indeed, said the Court, the witness' testimony might have favored the defendant and to infer the opposite was unwarranted and tended to "lead the jury to yield to conjectures and suppositions rather than to the actual evidence in the case."

The instant decision of the Court of Appeals for the Seventh Circuit is in conflict with that of the Court of Appeals for the District of Columbia in *Billeci* v. *United States, supra.* Accordingly, this Court should issue its writ of certiorari in order to resolve this conflict between circuits.

III.

The Court of Appeals has so far sanctioned a departure from the usual and accepted course of judicial proceedings as to call for an exercise by this Court of its power of supervision.

In 1853 the Supreme Court of Pennsylvania had occasion in *Phelin* v. *Kenderdine,* 20 Pa. 354, to consider an appeal from a judgment rendered in a civil case during which the appellee had urged in his argument to the jury that a witness' exercise of his privilege against self-incrimination be considered against the appellant. In reversing the judgment, the Supreme Court of Pennsylvania said, at page 363:

> "If the privilege claimed by the witness be allowed, the matter is at an end. The claim of privilege and its

> allowance is properly no part of the evidence submitted to the jury, and no inferences whatever can be legitimately drawn by them from the legal assertion by the witness of his constitutional right. The allowance of the privilege would be a mockery of justice, if either party is to be affected injuriously by it."

In the 102 years since *Phelin* v. *Kenderdine, supra,* the salutary principles therein announced have been followed by *every* appellate court in the United States, which has had occasion to consider this question. That is to say, every appellate court save the Court of Appeals for the Seventh Circuit in its determination of the instant cause. Thus in every instance where the successful party to litigation, be it civil or criminal, has urged the jury to draw inferences from a witness' refusal to testify, the appellate court considering the cause, has reversed.

In *Powers* v. *State,* 75 Nebr. 226, 106 N.W. 332 (1905) defendant was prosecuted for adultery. The State called the alleged adulterous woman as witness and interrogated her as to her relations with the defendant. She declined to answer on the ground that to do so might incriminate her. In his closing argument the prosecuting attorney urged that the witness, by the exercise of her privilege, had admitted her guilt and thus the guilt of the defendant was shown. On appeal, the Supreme Court of Nebraska reversed the conviction, saying at 106 N.W. 333:

> "Can it be said that the law would sanction . . . conviction of the man, not by statements of fact testified to by a witness, but upon the witness' refusal to state any facts. . . . This being the case that circumstance should not have been referred to by the County Attorney in his argument. . . ."

So, too, in *State* v. *Nelson,* 91 Vt. 168, 99 Atl. 881 (1917) the prosecutor, in a burglary trial, called as witnesses alleged accomplices of the defendant. Each refused to testify and the State's Attorney commented thereon in his clos-

ing argument. On appeal the judgment of conviction was reversed, the Court saying:

> "The argument in behalf of the state, in effect, asked the jury to conclude what the witnesses could have testified to if they would, and to consider such withheld testimony as having been actually given. The argument in behalf of the state in so far as it related to the refusal of the witnesses to give testimony, in the exercise of the privilege claimed by them and accorded them by the court, must have been prejudicial in the extreme to the right of the respondent to have his case tried by the jury agreeably to the evidence given them and necessitates a reversal."

And in *People* v. *Bennett*, 413 Ill. 601, 110 N.E. 2d 175 (1953) a witness was called who had been separately indicted for the same burglary and larceny with which the defendant was charged. The witness repeatedly invoked his privilege against self-incrimination. *No comment* was made thereon by the prosecutor in his closing argument to the jury. Yet, on appeal the Illinois Supreme Court reversed, saying (110 N.E. 2d at 176):

> "By his questions before the jury compelling the witness to claim his constitutional privilege [the State's Attorney] was able to suggest by implication, innuendo and insinuation that [the witness] and defendant had committed the crime for which the defendant was on trial. While the examination added little material evidence to the trial, it was certainly well calculated to prejudice the defendant in the eyes of the jury."

To the same effect as the foregoing are the decisions in *Billeci* v. *United States* (C.A. D.C., 1950), 184 F. 2d 394 (discussed in Point II hereof); *State* v. *Harper*, 33 Ore. 524, 55 Pac. 1075 (1899); *People* v. *Glass*, 158 Cal. 665, 112 Pac. 281 (1910); *People* v. *Black*, 73 Cal. App. 13, 238 P. 374 (1925); *People* v. *Irwin*, 20 Pac. 56 (Sup. Ct. Cal.

1888); *Waer* v. *Waer,* 90 Atl. 1039 (Ct. Ch. N.J. 1914); *Rice* v. *State,* 121 Tex. Cr. 68, 51 S.W. 2d 364 (1932); *McClure* v. *State,* 95 Tex. Cr. 53, 251 S.W. 1099 (1923); *Brock* v. *State,* 123 Ala. 24, 26 So. 329 (1899); See also, Anno., Inferences Arising from Refusal of Witness Other than Accused to Answer Question on Ground that Answer Would Tend to Incriminate Him, 24 A.L.R. 2d 895 (1950) wherein the annotator states that no case was found expressing a view opposite to the general rule that no inference can be drawn or urged against a defendant because of the failure of a witness to testify.

In the light of the unanimous, considered judgments of every appellate court in this country which has had the opportunity to consider this question, petitioner submits that the Court of Appeals has by its decision sanctioned such a departure from the usual and accepted course of judicial proceedings as to require this court to exercise its power of supervision. See, *Johnson* v. *United States,* 318 U.S. 189 (1942). Accordingly, this Court should issue its writ of certiorari to review the instant judgment of the Court of Appeals.

IV.

Assuming, arguendo, that Petitioner's counsel at trial did not adequately object to the occurrences here complained of, the misconduct of the United States Attorney is of such a nature as to affect Petitioner's substantial right to a fair trial and accordingly should have been considered by the Court of Appeals.

The Court of Appeals refused to give substantial consideration to the questions here presented upon the ground that the District Court granted all of the relief there sought by petitioner's court appointed trial counsel, *i.e.,* sustained an objection to the government attorney's argument to the jury. Thus the Court of Appeals said: "Defendant can-

not now in this court be permitted to capitalize on his counsel's failure to press for further action by the trial court." (Appendix A, pp. 4, 5.)

Of course petitioner has not "capitalized" on the failure of his counsel to take additional, vigorous steps to assure their client a fair trial. Rather it is the government who has so "capitalized", for it is fair to comment that the only answer advanced to this argument in the Court of Appeals was counsel's failure to seek additional relief.

Furthermore, in so holding the Court of Appeals overlooked the fact that from the conclusion of the trial petitioner was without counsel, his attorneys appointed by the District Court having then considered their duties at an end. Thus petitioner was left to his own devices with regard to post-trial motions by which he could have called the District Court's attention to the errors here advanced and presented to the Court of Appeals.

However, in the light of the facts here presented, it is submitted that the action taken by petitioner's trial counsel was sufficient to preserve the error. The court's attention was directed to the improper argument of the United States Attorney. At that point it was incumbent upon the District Court to take all steps necessary to remove the prejudice created by the improper remarks for, as this Court said in *Johnson* v. *United States,* 318 U.S. 189, at 199:

> "It is the *court* to whom an accused properly and necessarily looks for protection in such a matter." (Emphasis added)

See also *Wilson* v. *United States,* 149 U.S. 60 (1893) and *Graves* v. *United States,* 150 U.S. 118 (1893).

It was the foregoing rationale which prompted the courts of Nebraska and Vermont to reverse the convictions in *Powers* v. *State,* 75 Nebr. 226, 106 N.W. 332 (1905) and *State* v. *Nelson,* 91 Vt. 168, 99 Atl. 881 (1917), where, in

each instance, all relief asked of the trial court by the defendant was granted, *i.e.*, objections to the improper arguments were sustained and the jury admonished to disregard the incident.

Assuming, *arguendo*, that the action taken by petitioner's court appointed trial counsel was inadequate to preserve the errors here advanced, petitioner submits that the conduct of the trial court in permitting the government to recall Alvin Bardin as a witness, it having become known to the court and prosecutor that the witness would invoke his privilege against self-incrimination, and the United States Attorney's closing argument to the jury in which he urged that an inference be drawn against the defendant from the witness' silence, so violated petitioner's right to a fair trial as to constitute plain error under Rule 52(b) of the Federal Rules of Criminal Procedure. See *Berger* v. *United States*, 295 U.S. 78 (1935); *Krulewitch* v. *United States*, 336 U.S. 440 (1949). As such the Court of Appeals was bound to give thoughtful consideration the question here presented.

CONCLUSION.

In every case in which, as in the case at bar, investigation reveals that the defendant was associated in his alleged criminal activity with another person, the vicious tactic here employed by the United States Attorney is available. Thus, the question presented here is of a recurring nature.

Quite understandably any question as to the fairness of a trial is of immediate and direct concern to the convicted defendant. However, its wider importance lies in its significance to the public at large. The rights of all are adversely affected when the rights of one are substantially impaired or disregarded. And this is especially so if the impairment or want of regard transpires under legal forms.

As has been demonstrated above, the decision of the Court of Appeals is in conflict with an applicable decision of this Court; is in conflict with a decision of the Court of Appeals for the District of Columbia on the same matter; and so far sanctions a departure from the usual and accepted course of judicial proceedings as to call for an exercise by this Court of its power of supervision.

Accordingly, it is respectfully submitted that this cause is one which justifies the issuance by this Court of its writ of certiorari to the Court of Appeals for the Seventh Circuit and thereafter reviewing and reversing the judgment of that court and remanding this cause to the United States District Court for the Southern District of Indiana with instructions that petitioner be granted a new trial.

Respectfully submitted,

Wesley G. Hall
Prentice H. Marshall,
Counsel for Petitioner.

11 South LaSalle Street
Chicago 3, Illinois

In the

United States Court of Appeals

For the Seventh Circuit

No. 10953. October Term, 1954, October Session, 1954.

United States of America, *Plaintiff-Appellee,* *vs.* Lawrence P. Bardin, *Defendant-Appellant.*	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

June 3, 1955.

Before Finnegan, Swaim and Schnackenberg, *Circuit Judges.*

Schnackenberg, *Circuit Judge.* We have awaited the decisions of the United States Supreme Court in *Holland* v. *United States*[1] and other "net worth" tax cases. Our consideration of the principles of law there formulated which we deem applicable to this case, followed by a divergence of views among the members of this court, has delayed the decision. The writing of an opinion was assigned to the author on April 14, 1955.

This is an appeal from a judgment of the district court, entered on the verdict of a jury finding defendant guilty, as charged in a two-count indictment, of willfully and knowingly attempting to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1946.

Count I charged that on or about May 26, 1947, defendant did willfully and knowingly attempt to defeat and evade said tax by filing a false and fraudulent income tax return for the calendar year 1946, wherein he stated his net

1. 348 U. S. 121, Dec. 6, 1954.

income for said year was $528,824.56 and the tax due and owing thereon was $426,382.89, whereas, as he then and there well knew, his net income for said year was $759,-827.94, more or less, and the tax due thereon was $639,-841.28, more or less. Count II charged that "on or about September 15, 1946, through and including May 27, 1947", the defendant did willfully and knowingly attempt to defeat the payment of said tax due and owing by him "by concealing and attempting to conceal from the Collector of Internal Revenue the nature and extent of his assets and the location thereof, said tax being $639,841.28, more or less, by refusing to pay said tax due and owing, and at said times he having funds with which to pay said tax." Both counts are based on 26 U. S. C. A., § 145(b). Defendant urges as grounds for reversal: (1) the trial court's refusal to grant defendant's motion for acquittal, (2) the alleged misconduct of the United States attorney during the course of the trial, and the trial court's alleged failure to take proper and necessary steps to prevent the said misconduct from influencing the jury in its deliberations, and (3) count II actually charged defendant with a misdemeanor, rather than a felony, and was therefore barred by the statute of limitations.

1. Whether the trial court erred in refusing to grant defendant's motion for acquittal, requires us to determine whether the substantial evidence, taken in a light most favorable to the prosecution, tends to show the defendant is guilty beyond a reasonable doubt. *United States* v. *Yeoman-Henderson, Inc.*, 193 F. 2d 867, at 869. The facts thus proved by such evidence, much of it undisputed, are as follows:

This case involves defendant's income for the calendar year 1946.

On December 6, 1945 defendant closed a deal for the purchase of a brewery, and embarked upon the business of selling beer at prices above the ceiling prices fixed by federal price control regulations. Specific payments to him for this purpose during the taxable year 1946 totaled $242,492.00. He failed to keep adequate financial records. He also carried on extensive tradings in grains through brokerage houses.

Defendant put $250,000 in a safe in his brother's home in California. According to defendant, $175,000 was secreted there in 1946, and the balance of $75,000 in early

January, 1947. The jury could reasonably infer that this $75,000 was a part of defendant's income for 1946, rather than that it constituted income for the period from January 1, 1947 to January 15, 1947, when it was deposited in the safe in California.

On January 1, 1946 defendant's net worth was $51,297.85, and on December 31, 1946, it was $799,610.67. Thus, the difference between the amounts on the first and last days of 1946, or the net worth increase for 1946, was $748,312.82. The addition of non-deductible expenditures for 1946 increased the latter figure to $758,713.94. This was defendant's net income for 1946 computed according to the net worth theory formula. *Holland* v. *United States*, 348 U. S. 121, at 125. The net income reported by defendant on his return for that year is $528,824.56. He filed no returns prior to 1942. According to income tax returns filed with the Internal Revenue Collector, the defendant and his wife had a total income of $3,861.15 and net income of $2,311.15 for the year 1942. For 1943 they had a total income of $12,067.25 and net income of $1,602.25. For the next two years, defendant alone reported as follows:

Year	Gross Income	Net income
1944	$8,314.85	None
1945	8,196.15	$3,873.30

These figures tend to show that defendant's income during prior years was insufficient to have enabled him to save any appreciable amount of money, and thus tend to corroborate the relatively low figure set by the government as defendant's beginning net worth. *Holland* v. *United States, supra*, at 133.[2] Defendant failed to file an estimated return for 1946 and delayed filing an actual return until May 27, 1947.

On June 13, 1947, defendant talked to the assistant collector of internal revenue. He claimed inability to pay the tax in the amount shown by his return. He failed to mention $25,000 which was later found in cash in a safe deposit box and turned over to the government on a court order and about $20,000 due him on an account with his stock

2. The evidence also shows an alternative calculation based upon *United States* v. *Johnson*, 319 U. S. 503, at 517. Defendant's total expenditures for 1946 amounted to $831,441.15, as against his reported income of $521,883.63. That he had large, unreported income, was reinforced by this proof.

broker. A day or two prior to June 19, 1947 defendant withdrew the latter amount from the stock broker. He also failed to mention $46,939.94 which was in one of his bank accounts known as "L. P. Bardin for account of Alvin Bardin." All this was in addition to the sum of $250,000 withdrawn from Indianapolis banks during 1946 and taken by defendant personally to California and hidden in the safe hereinabove referred to. Although defendant, when pressed by the government to file a 1946 income tax return, reported, on May 26, 1947, that this money was stolen from the safe during a burglary the day before, and the physical circumstances surrounding the safe at least simulated a burglary, none of the money was ever recovered, and no one connected with the commission of the alleged crime was ever apprehended.

From the foregoing facts the jury was justified in finding that defendant was proved guilty as to count I beyond a reasonable doubt, though not to a mathematical certainty. No more was required. *Holland* v. *United States, supra,* at 138.

The conduct of the defendant in connection with his belated filing of his 1946 tax return, and his misrepresentations as to his inability to pay any part of his tax, support the verdict of the jury as to count II.

The trial court did not err in denying defendant's motion for acquittal.

2. Alvin Bardin, brother of defendant, was called as a government witness. He declined to answer certain questions on the ground that to do so might incriminate him. The court sustained the position of the witness and he was excused. Upon his departure from the stand no admonition was given by the court to the jury that they should draw no inferences unfavorable to the defendant from the witness' refusal to testify.

In his closing statement, the district attorney referred to the fact that Alvin Bardin had exercised his privilege of refusing to testify, and asked the jury why he did that. At this point defense counsel objected, and that objection was sustained by the court. Thereupon the district attorney asked the jury to disregard any reference he had made to the failure of the witness to testify. Defense counsel made no motion in reference to the incident and did not ask the court to admonish the jury in reference to the matter. Defendant cannot now in this court be permitted to capitalize

on his counsel's failure to press for further action by the trial court. Moreover, the court's sustaining of the objection clearly indicated to the jury that the remark of government counsel was improper.

We do not believe that these incidents deprived defendant of a fair trial, or that the action of the court in connection with them was erroneous.

A dissenting opinion by our colleague speaks of the failure of the district court to give to the jury such an instruction on the net worth theory as is referred to in *Holland* v. *United States, supra.*

On the trial there was no instruction tendered by defendant which was refused by the court. In this court his counsel has not assigned error on the subject of instructions. He was represented in the trial court by a member of the bar of this court, whose competency has not been questioned herein. In this court, his present counsel has filed a brief and made an oral argument which attests not only to his competency, but also to the diligent effort which he made to properly present all questions deemed to be available on this appeal. Present counsel has not argued or briefed any point on the instructions.[3]

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3. In view of this record, the matter of an instruction on the net worth theory is undoubtedly irrelevant. However, we note that in *Holland* v. *United States*, 348 U. S. 121, at 129 (which decision was announced after the trial and the arguments before this court in the case at bar), it was pointed out that charges to a jury in such a case should be especially clear, including, in addition to the formal instructions, a summary of the nature of the net worth method, the assumptions on which it rests, and the inferences available both for and against the accused.

In the case at bar, in reference to the net worth theory, the court instructed the jury:

> "In determining whether defendant Bardin received a net income in excess of that reported in his income tax return for the year 1946, you may consider the facts and circumstances in evidence and view them in relation to each other. In this connection, you may compare the defendant Bardin's net worth of assets at the beginning of the taxable period in question and his net worth of assets over income reported at the end of that period. You may also consider any expenditures of the defendant Bardin, as well as any property acquired by him during the period involved, as shown by the evidence."

The instruction on the same subject given in the *Holland* case, which has been made available to this court by the clerk of the United States Supreme Court, reads:

> "Now, Ladies and Gentlemen of the Jury, the Government has produced evidence here that on January 1, 1946, Mr. and Mrs. Holland had certain property, of a value with respect to which the Government has presented evidence. And the Government says that at that time they had a net worth of some nineteen thousand dollars. The Government says that three years later—this is their claim, you know—the Government says that at the end of 1946 their net worth was

3. Defendant contends that his prosecution under count II was barred by the three-year statute of limitations,[4] because that count charged a misdemeanor under section 145(a),[5] not a felony under section 145(b).[6] He relies on *Spies* v. *United States*, 317 U. S. 492.

The material allegations of count II are:

> "That on or about September 15, 1946, through and including May 26, 1947, in the Indianapolis Division of the Southern District of Indiana, Lawrence P. Bardin did willfully and knowingly attempt to defeat the payment of the income tax due and owing by him to the United States of America for the calendar year 1946 by concealing and attempting to conceal from the Collector of Internal Revenue the nature and extent of his assets and the location thereof, said tax being $639,841.28, more or less, by refusing to pay said tax due and owing, and at said times he having funds with which to pay said tax, all in violation of Title 26, U. S. C., Section 145(b)."

Defendant says that the crux of the matter was defendant's refusal to pay his tax obligation, *i.e.*, his willful failure to pay said tax. The pertinent parts of § 145(a) provide:

> "Any person required under this chapter to pay any estimated tax or tax * * * who willfully fails to pay such estimated tax or tax * * * shall * * * be guilty of a misdemeanor and, upon conviction thereof be fined not more than $10,000.00, or imprisoned for not more than one year, or both, * * *."

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increased, and again at the end of 1947 that their net worth was further increased, and again at the end of 1948 their net worth was again increased. And the Government says it is reasonable to infer that the increase in the property that they owned, and in the value of it, is attributable and were the result of purchases from receipts earned in the taxable years in question from that business."

Neither of these instructions tells the jury of the pitfalls inherent in the net worth method, yet, while defense counsel in the *Holland* case specifically objected to the instruction given, on the ground that it did not fully explain the net worth theory, the objection was overruled and his two tendered instructions explaining the theory in more detail, were refused. Yet the court affirmed the conviction.

It seems clear that the language of the *Holland* opinion will be a guide for future trials based on the net worth theory, but it does not indicate that, in cases previously tried, the failure to give a net worth instruction other than that given in the *Holland* case and in the case at bar, requires reversal.

4. 26 U. S. C. A., § 3748(a).

5. 26 U. S. C. A., § 145(a).

6. *Ibid.* § 145(b).

and of § 145(b) provide:

> "* * * any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall * * * be guilty of a felony, and, upon conviction thereof, be fined not more than $10,000.00, or imprisoned for not more than five years, or both * * *."

A failure to pay a tax, under § 145(a), and an attempt to defeat and evade one, under § 145(b), must both be willful. However, the difference between the two offenses is found in the affirmative action implied from the term "attempt" as used in § 145(b), the felony sub-section. As the court said in *Spies* v. *United States, supra,* at 499:

> "Willful but passive neglect of the statutory duty may constitute the lesser offense, but to combine with it a willful and positive attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony."

Accordingly, in count II, a willful and knowing attempt is charged in the affirmative action taken by the defendant to accomplish his purpose, *i.e.*, "by concealing and attempting to conceal from the collector of internal revenue, the nature and extent of his assets and the location thereof." Indeed, the court in *Spies* v. *United States, supra,* at 499, in illustrating what conduct would justify a basis for "affirmative willful attempt", listed, among others, "concealment of assets or covering up sources of income." In view of the fact that defendant was engaged in transactions which exposed him to prosecution under the federal price regulations, the following statement of the court in *Spies* v. *United States, supra,* also at 499, is pertinent here:

> "If the tax-evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime."

We hold that count II charges a felony under § 145(b).

Mr. Prentice H. Marshall, a member of the bar of this court, served in this court as appointed counsel for the defendant. We express our appreciation of his diligent performance of his duties.

For the reasons herein set forth, we affirm the judgment of the district court.

FINNEGAN, *Circuit Judge.* Dissenting. Judicial bouquets handed appellate-defense counsel for earned competency, are small simple solace to this defendant, now confronted with prison. Indeed, I cannot, as easily as the majority does, approve deprivation of liberty, nor countenance such facile stigmatizing with a criminal conviction. I also entertain grave doubts that the Government's fiscal affairs are in so delicate balance that a new trial would jeopardize that financial equilibrium. My concern, here, is whether there are present "plain errors or defects affecting substantial rights" which "may be noticed although they were not brought to the attention of the court." Rule 52(b), Fed. R. Crim. Proc., 18 U. S. C. A. I think Rule 52(b) supercedes Rule 30, Fed. R. Crim. Proc., 18 U. S. C. A. in appropriate cases. This appeal brings into sharp relief some of the ideas captured by Mr. Justice Frankfurter in a passage from *Bollenbach* v. *United States,* 326 U. S. 607, 615 (1946), where, speaking for the majority he said:

> "From presuming too often all errors to be 'prejudicial,' the judicial pendulum need not swing to presuming all errors to be 'harmless' if only the appellate court is left without doubt that one who claims its corrective process *is, after all, guilty.* In view of the place of importance that trial by jury has in our Bill of Rights, it is *not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused,* however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be." (Italics added.)

Previously our court paid homage to those principles [*United States* v. *Levi,* 177 F. 2d 833, 835 (7th Cir. 1949), *United States* v. *Raub,* 177 F. 2d 312, 315 (7th Cir. 1949), *United States* v. *Haupt,* 136 F. 2d 661 (7th Cir. 1943)] and now I perceive no justifiable reason for being deflected from them. "Strictly speaking," said Mr. Justice Harlan, when delivering the majority opinion reported as *Davis* v. *United States,* 160 U. S. 469, 487-488 (1895), "the burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of the trial and applies to every element necessary to

constitute the crime." Having awaited, as my brothers particularly note, that quartet of decisions lead by *Holland* v. *United States*, 348 U. S. 121, 138 (1954) it is well to recall this apt statement from that opinion:

> ". . . The Government must still prove every element of the offense beyond a reasonable doubt though not to a mathematical certainty. The settled standards of the criminal law are applicable to net worth cases just as to prosecutions for other crimes. . . ."

A judicial poultice applied at our reviewing level may palliate the sting of error committed below, but such treatment falls far short of an actual cure attainable only by ordering a new trial. *Bihn* v. *United States*, 328 U. S. 633 (1946).

Wiborg v. *United States*, 163 U. S. 632, 658 (1896), a precursor to current Rule 52, contains Chief Justice Fuller's trenchant observation concerning a certain question not properly raised and about which he wrote: ". . . yet if plain error was committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it." That Rule 52 (b) Fed. R. Crim. Proc., 18 U. S. C. A. is a restatement of existing law, see 6 Institute Proceedings, N. Y. Univ. Sch. of Law, 88 (Fed. R. Crim. Proc. with Notes, 1946). See also: Barron, Federal Practice and Procedure, Rules Edit., § 2587 (1951).

I refuse to affirm Bardin's conviction because, upon mature consideration of this record, I think it embodies several plain errors and defects affecting substantial rights belonging to defendant. Therefore, I cannot placidly cite *United States* v. *Yeoman-Henderson, Inc.*, 193 F. 2d 867 (7th Cir. 1952) and simply state the trial court acted correctly in denying defendant's motion for judgment of acquittal. Because even if the defendant appears to be a bad man in light of the prosecution's portrayal, he is still entitled to a fair and impartial trial free from plain errors and defects mentioned in Rule 52(b). See my recent dissenting opinion in *United States* v. *Vasen*, No. 11209, U. S. Court of Appeals, 7th Cir., April 15, 1955. The converse of this proposition is virtually the inarticulated major premise underlying affirmance of Barden's conviction. Turning now to the two major areas of error for which I would reverse, they can be grouped as follows: (1) insufficient jury instructions and, (2) prejudicial conduct of the prosecuting attorney.

Merely recording recognition, without more, of the familiar and well settled postulate pervading all criminal prosecutions, i. e., the persuasion must be beyond a reasonable doubt, is insufficient in this appeal. Yet, I am also aware: "the truth is that no one has yet invented or discovered a mode of measurement for the intensity of human belief. Hence there can be yet no successful method of communicating intelligibly to a jury a sound method of self-analysis for one's belief." 9 Wigmore, Evidence, § 2497 (3rd ed. 1940). Despite Dean Wigmore's report of judicial struggles to articulate the definitive characteristics of "beyond a reasonable doubt" that phase remains the bench-mark in criminal cases. In Bardin's case the character of evidence spun on looms of computations powered by the net worth theory would have considerable impact on the minds of his jurors.

Since there is a grave possibility that jurors' reaction to *reasonable doubt* will vary with instructions given them on various aspects of the case there is an acute need for careful judicial guidance in cases of this sort. When instructions are insufficient in this, or any, net-worth-expenditure case undue strength is lent the prosecutions' theory. I think this defendant has the right to have a jury weigh the *nature* of proof offered against him. The difference between theorizing and suspicioning, in these cases, is that in the former formidable working papers and a maze of figures casts an aurora of reliability around the government's accountants. Indeed, the Holland majority's admonition (348 U. S. 121, 129) should be pointed up, because at the trial level, in Bardin's case, the Government erected its case against him by coupling the *expenditures theory* with the *net worth theory:*

> "Appellate courts should review the cases bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation."

In this case for the tax year 1946 the government has reconstructed what it contends was income flowing into Bardin's hands during that period. It has attempted to form a bridge between the opening and closing of that taxable year by detailing intermediate changes through a summation of transactions. This merely means that a hypothesis is sponsored concerning Bardin's taxable income for 1946, and various changes are analyzed. But

these computations involve drawing of inferences by the government's witnesses which are, in turn, passed on to the jury for further extraction of inferences. I am well aware of the difficulties implicit in prosecuting persons accused of violating § 145, but I do think when such estimates are submitted to a jury the fact-finders ought to be told about the method. My cautionary mood, here, is fairly well described by that which Mr. Justice Clark reports as the stimulas for taking and reviewing *Holland* v. *United States*, 348 U. S. 121, 124-125 (1954):

> "In recent years . . . tax-evasion convictions obtained under the net-worth theory have come here with increasing frequency and left impressions beyond those of the previously unrelated petitions. We concluded that the method involved something *more than the ordinary use of circumstantial evidence* in the usual criminal case. Its bearing, therefore, on the safeguards traditionally provided in the administration of criminal justice called for a consideration of the entire theory. . . ." (Italics supplied.)

To appreciate the impact upon the jury of the net-worth theory—and it is simply a theory, it becomes necessary to examine that technique under one phase of the statutory setting for violation of which this defendant was prosecuted. Section 145(b) of the Revenue Act of 1939, 26 U. S. C. 145(b) (1953), 53 Stat. 62-63 (1939) does not contain the words "fraud" or "criminal fraud." Bardin is prosecuted under that section for non-disclosure of alleged income, and the conduct with which he is charged must be willful. *United States* v. *Murdock*, 290 U. S. 389, 394-396 (1933). *Spies* v. *United States*, 317 U. S. 492, 499 (1942) contains some faint adumbration of criteria indicative of conduct proscribed by the words, ". . . any person who willfully attempts *in any manner* to evade or defeat any tax . . .," appearing in § 145(b). From *Spies* v. *United States*, 317 U. S. 492 (1942) comes this explanation of the dichotomy embraced by § 145: (i) "willful failure to pay the tax when due is punishable as a misdemeanor" (§ 145a) and, (ii) the "serious and inclusive felony defined to consist of willful attempt in any manner to evade or defeat the tax. § 145(b)." Of course the language of § 145(b) outlawing attempts to evade taxes "in any manner" is sweeping enough to make it a felony to willfully omit income from a tax return which has been

filed. *United States* v. *Beacon Brass Co.*, 344 U. S. 43 (1952). The problem lies in proof of such an act by application of the indirect methods of computing income, *i. e.*, net-worth expenditure theory.

When reversing a conviction, under § 145(b), bottomed on the "expenditure" method, reported as *United States* v. *Caserta*, 199 F. 2d 905 (2d Cir. 1952), Judge Goodrich summarized the so-called net-worth theory as follows:

> "This theory is in effect that if a taxpayer's net worth has increased during a given period in an amount greater than his reported income for the period, there must be a discrepancy in his income tax return and payment.
>
> "An outgrowth of this net-worth method is the 'expenditure' test . . .."

A letter, dated May 26, 1947, written by Bardin and transmitted to the Collector of Internal Revenue with his income tax return for 1946, supplies the first and dominant strand in the texture of this case. After apologizing for tardily filing his return after the expiration of an extension of time previously granted, defendant stated:

> "However, I will be unable to pay this tax or any part of it for an indefinite time to come. I had $250,000.00 in cash in a safe in my brother's home in Los Angeles, California, until yesterday when the safe was burglarized and the money was stolen. This is a very heavy loss as you will realize and unless the money can be recovered, it is going to be very difficult for me to pay anything. The theft has been reported to the F.B.I. and to the police at Los Angeles."

After Government witness, W. Plummer, assistant director of the Bureau of Internal Revenue, identified the foregoing letter, it was received in evidence without objection. As the result of Plummer's conferences with Bardin during June, 1947, defendant submitted the following "Verified Statement of Assets and Liabilities" to the government, and it was subsequently introduced into the record below:

ASSETS.

Cash on hand	$ 110.00
Amount stolen from safe in home of Archie Bardin in Los Angeles, California	250,000.00
Airplanes	None
Automobiles	None
Real Estate	None
Personal effects, clothing, wrist watch	250.00
Loaned to W. G. Brower of Indianapolis, Indiana the sum of $55,000 evidenced by the promissory note of the said Brower in the principal sum of $55,000 and which note is secured by 800 shares of the preferred stock and by 24,000 shares of the common stock of Cold Springs Brewing Co., Lawrence, Massachusetts; also secured by 3000 shares of common stock in The Walnut Corporation, Boston, Mass., contingent value	55,000.00
Creditors claims against Cold Springs Brewing Co. purchased by Lawrence P. Bardin for which he paid the sum of $8,500, the claims amounting to $16,124, present estimated value	4,000.00
Account with Thomson & McKinnon of Indianapolis, Indiana	450.00
Total Assets	$309,810.00

LIABILITIES.

Income Tax, Collector of Internal Revenue, as shown by return of Lawrence P. Bardin	$481,000.00
(This does not include interest or penalty. Furthermore, taxpayer expects to file an amended return which will show a tax liability of less than $481,000, the exact amount of which has not as yet been determined.)	
Claim in suit of County Distributors, Inc. v. Lawrence P. Bardin in the Suffolk Superior Court, Cause No. 413429, Boston, Massachusetts, cause pending, no legal liability, cost of defense, contingent liability	1,000.00

Claim in suit of U. S. v. Lawrence P. Bardin, et al., Cause No. Criminal 8711 in the U. S. District Court in Indianapolis, Indiana, no personal liability on the part of Lawrence P. Bardin.....	0
O.P.A. suit in the U. S. District Court at Indianapolis, Indiana, against Lawrence P. Bardin, et al., Cause No. Civil 1376, compromise contingent liability.....	50,000.00
Total Liabilities	$532,000.00"

Portions of certain witnesses' testimony may well be injected at this juncture on matters supplied by defendant. Archie Bardin, brother of the defendant, testified that while living in California during 1946 and 1947, taxpayer had a safe "put in" the witness's home. He described, as part of his testimony given for the government, this safe as being a little round floor one which was in the corner of a closet. Archie Bardin denied having access to the safe. He also recounted a chaotic scene, he found one day in May, 1947, upon returning home from a visit to the beach with his wife and children. It was, then, Archie Bardin found this safe "burned open." This witness disclaimed any knowledge of the safe's contents prior to the episode. He notified the Los Angeles Police Department and his brother, the defendant, who arrived in Los Angeles "the next day or a day later."

Confirmation of the household disarray, discovered by Archie Bardin, came from Sergeant R. S. Ruble, safe burglary detail, Los Angeles Police Department. His investigation, related as a government witness, disclosed that Archie Bardin's house had been entered by cutting a window screen. He found their house completely disarranged and the cylinder type Keyway floor safe burned open by use of an acetylene torch. In the bottom of this safe he found small minute papers and one envelope—on which was partially legible, "The Property of L. L.," and under "L", "Indianapolis Brewing Company, Indianapolis," and "small pieces of money, just the edges of money that you could tell it was currency." In the evening of the day he commenced his investigation, Sergeant Ruble's partner talked with Lawrence Bardin over the telephone. Without objection from counsel, Ruble related his partner's con-

versation with defendant Bardin in which Bardin said he placed $250,000 in the safe; his first deposit of $100,000 being made on December 5, 1946 after drawing this sum from an Indiana bank and flying, in his private plane, to California; that sometime after Christmas and before New Year's (in the year of 1947) defendant said he had placed $75,000.00 in this safe, and on January 15th or 20th he put another $75,000 in the safe—half of this sum coming from the Indiana National Bank; the balance from the Fidelity Trust Company Bank. Defendant was said to have stated he personally made these deposits; that no one save Lawrence Bardin had keys to the safe "and no one had permission to enter and no one knew the amount of money in the safe." Sergeant Ruble expressed a deprecatory opinion of the safe. While no recovery of the money had been made, Ruble stated: "We think we have a good lead on where part of the money is located at the present time. It was burned and scorched and unable to be patched. We have several good suspects in the case. We were able to go so far as to establish who our suspects were and we can put them in Los Angeles at a certain hotel a few hours prior to the burglary. We can identify the box that otherwise was being carried into the house, which ties it up in our own mind pretty well."

Momentarily putting to one side that evidentiary segment, brings me to several theories on which the government tried this case below. During the calendar year of 1946 the prosecution contends:

(a) Lawrence Bardin sold beer at over-ceiling prices and received, according to the proof below, $224,122 in payments.

(b) He spent approximately $856,891.15.

(c) Yet, reported taxable income of $528,824.56 for 1946.

(d) During 1946 his net worth increased $748,312.82.

Of course this is a capsuled version of the prosecution's case against defendant Bardin. But it penetrates to the core of the evidence. In other words the magnitude of Bardin's expenditures, it is contended, manifest presence of unreported taxable income for 1946, net worth methodology supplies the hypothesis for establishing and accounting for variations in his assets, and testimonial evidence tabulated some receipts and disbursements.

After his motion for judgment of acquittal was denied, defendant introduced several pieces of documentary evidence concerning litigation involving himself, Alvin Bardin, Indianapolis Brewing Company, Denmark Brewing Company, Eulberg Brewing Company and the Government. By introducing evidence after the government rested, and subsequent to his motion, defendant has precluded us from reviewing that first motion. *United States* v. *Aman*, 210 F. 2d 344, 346 (7th Cir. 1954). By his second motion for judgment of acquittal interposed at the close of all the evidence, defendant has raised several major points for determination. Briefly, he urges that the evidence is insufficient to sustain a conviction under either Count I or II, and "that there is no proof of the corpus delicti independently of extra judicial admissions of the defendant"; "The net worth-expenditure method of establishing net income, being based upon circumstantial evidence, cannot be applied in this cause because the evidence fails to establish with certainty or accurately the net worth of the defendant at the beginning of the tax year in question and therefore is uncertain and does not form a proper basis upon which to apply and determine the net worth at the end of the period in question." And that ". . . the evidence introduced by plaintiff establishes the fact that the defendant in his income tax return in question actually overstated his net taxable income."

Parenthetically I note defendant's "standing objection," reflected in this record, to various lines of direct examination and evidence of defendant's admissions and statements. I also recognize that at least at one interview with Internal Revenue agent Loyd, the defendant was accompanied by his two lawyers. At this conference Bardin discussed certain phases of his income tax liability for 1946.

Corpus delicti is a phrase that has suffered treatment as an intellectual shuttlecock in many judicial opinions. I think the following an authoritative explanation of its definitive characteristics:

> "It is clear that an analysis of every crime, with reference to this element of it, reveals three component parts, *first*, the *occurrence* of the specific kind of injury or loss (as, in homicide, a person deceased . . .); *secondly*, somebody's criminality (in contrast, e. g. to accident) as the source of the loss,—these two together involving the commission of a crime by *some-*

body; and, *thirdly,* the accused's *identity* as the doer of this crime.

(1) Now, the term 'corpus delicti' seems in its orthodox sense to signify merely the first of these elements, namely, the *fact of the specific loss or injury sustained;* . . . This, too, is a 'a priori' the more natural meaning; for the contrast between the first and the other elements is what is emphasized by the rule; *i. e.* it warns us to be cautious in convicting, since it may subsequently appear that no one has sustained any loss at all; . . .

(2) But by most judges the term is made to include the second element also, *i. e. somebody's criminality* . . .

This broader form makes the rule much more difficult for the jury to apply amid a complex mass of evidence, and tends to reduce the rule to a juggling-formula.

(3) A third view, indeed, too absurd to be argued with, has occasionally been advanced, at least by counsel, namely, that the 'corpus delicti' includes the third element also, *i.e. the accused's identity* or agency as the criminal. By this view, the term 'corpus delicti' would be synonymous with the whole of the charge, and the rule would require that the whole be evidenced in all three elements independently of the confession, which would be absurd . . ." (VII Wigmore, *Evidence,* § 2072 (3rd ed. 1940).)

Recently, another "net worth case," *Smith* v. *United States,* 348 U. S. 147, 154-155 (1954) precipated some pronouncements relevant here:

". . . But in a crime such as tax evasion there is no tangible injury which can be isolated as a *corpus delicti.* As to this crime, it cannot be shown that the crime has been committed without identifying the accused. Thus we are faced with the choice either of applying the corroboration rule to this offense and according the accused even greater protection than the rule affords to a defendant in a homicide prosecution . . . (citing) . . . or of finding the rule wholly inapplicable because of the nature of the offense, stripping the accused of this guarantee altogether. We choose to apply the rule, with its broader guarantee, to crimes in which there is no tangible *corpus delicti,*

where the corroborative evidence must implicate the accused in order to show that a crime has been committed. . . .

". . . There is some uncertainty in the lower court opinions as to whether the corroboration requirement applies to mere admissions. . . . We hold the rule applicable to such statement, at least where, as in this case, the admission is made after the fact to an official charged with investigating the possibility of wrong doing, and the statement embraces an element vital to the Government's case. . . ."

I confine my dissent to certain factual aspects demonstrative of the need for suitable instructions consonant with precepts announced in *Holland* v. *United States*, 348 U. S. 121.

So much, then, of the facts, relevant to this opinion follow. Defendants' federal income tax returns for the calendar years 1942 to 1946 were introduced in evidence. Neither Lawrence Bardin, nor his wife, filed any such returns prior to 1942. He reported net income of $2,311.15 for 1942, $1,717.25 in 1943, $8,114.85 in 1944, and $2,873.30 in 1945.

Attached to his 1945 return is a statement scheduling various capital transactions, including the sale of grain futures during the last three days of 1945. Bardin stated his occupation, variously, as manufacturer, broker, salesman and executive in different returns. No 1946 estimated tax return was filed by him.

During 1945, Frank McHale was a principal stockholder in, and attorney for, the Indianapolis Brewing Company. From this witness' testimony, given in the government's behalf, it appears that Lawrence Bardin, and two attorneys, Klein and Jacobson, negotiated with McHale for the purchase of that Brewery, and as a result an agreement was prepared for stockholder approval. Jacobson represented Alvin Bardin. This sale, closed December 6, 1945, was for a total price of $476,662.16. Alvin Bardin, pursuant to contract terms, was to pay $215,464.26 and on December 6, 1945, he paid $35,464.26. At a special board of directors' meeting held December 7, 1945, new directors succeeded the old, who resigned, and Alvin Bardin was named president. Thereupon, Indianapolis Brewing purchased from Alvin Bardin capital stock of Denmark and Eulberg Breweries, paying him for each block, respectively

$98,200.00 and $81,100. Adding this payment, totaling $179,300 to the prior $35,464.26 payment equated to the agreed down payment of $215,464.26. Six promissory notes were executed totaling $261,197.90, representing the unpaid balance on purchase price due to the Indianapolis Brewing Company stockholders.

Under its mortgage to the Fidelity Trust Company, Indianapolis Brewing Company borrowed $120,000.00 on December 14, 1945, using the Denmark and Eulberg stock as security. This same day Alvin Bardin paid $90,000.00 out of the borrowed funds, thereby reducing indebtedness to a former Indianapolis shareholder to $171,197.90. After May 27, 1946, this balance was paid in full.

Nine government witnesses testified, in substance, that during 1946, they paid overceiling prices to Lawrence Bardin for beer—the legal price being paid by sight draft invoice bill of lading to Indianapolis Brewing Company. This source, according to Special Agent Loyd, whose testimony we subsequently point up, produced $224,122. All government witnesses related their personal negotiations with defendant under which they were supplied with beer only upon paying money over the list price, at prices averaging from 10¢ to $1.60 per case. Some evidence presented by the prosecution indicated defendant sought out these persons when he, Lawrence Bardin, was attempting to finance the purchase of the Indianapolis and Denmark Breweries.

Special Agent Hugh S. Loyd, Bureau of Internal Revenue, was a pivotal government witness. On April 15, 1949 he interviewed the defendant and during this interview Lawrence Bardin stated *inter alia:* that he was uncertain as to what amount of money, if any, Alvin Bardin owed him at the end of 1944, 1945 and 1946; that he and Alvin had obtained advance deposits from prospective customers of the Denmark and Eulberg breweries, used in the acquisition of the stock of those companies; that he was uncertain as to the amount of cash he had on hand at the end of 1945 and 1946; that he initiated the negotiations leading to the acquisition of the Denmark and Indianapolis breweries; that some of his personal expenses were paid through the account entitled "L. P. Bardin for acct of Alvin Bardin"; that Alvin Bardin furnished the funds which were credited to that account; that Alvin Bardin furnished the funds with which he, defendant, paid the former share-

holders of the Indianapolis Brewing Company; that he had invested approximately $150,000.00 in the Cold Spring Brewery in 1947; that he obtained the funds for this investment, as well as the amounts deposited with Thomson and McKinnon and the $250,000.00 cash stolen from the Los Angeles safe, by overceiling collections on the sales of beer by the Indianapolis Brewing Company.

Loyd further testified that the testimony and evidence showed:

(a) the defendant had received overceiling payments in the amount of $224,122.00;

(b) the defendant had invested $329,765.30 in cashier's checks during 1946 (this amount Loyd later raised to $451,437.32);

(c) as of the end of 1946 there were credits in defendant's account with Daniel F. Rice of $7,657.82, and with Thomson & McKinnon of $151,546.42, with a resultant net credit after charges in both of $139,208.19;

(d) in 1947, the defendant had invested $150,000.00 in the Cold Springs Brewing Company;

(e) the defendant claimed a deduction of $5,339.84 for Indiana Gross Income Tax though he had paid $2.50;

(f) during 1946, the defendant made expenditures of:
(1) $7,657.82 deposited with Daniel F. Rice;
(2) $151,546.42 deposited with Thomson & McKinnon;
(3) $241,973.00 credited to the account "L. P. Bardin for the acct of Alvin Bardin";
(4) $171,197.90 payments to former shareholders;
(5) $4,813.20 payments on income tax;

(g) these expenditures totaled $692,887.17 from which Loyd eliminated certain itemized matters totaling $85,996.02, leaving net expenditures of $606,891.15 (502-504);

At this juncture defense counsel renewed a previous objection raised against Loyd's recapitulation of evidentiary data concerning net worth, but the trial judge stated "This is the summary breakdown." Loyd continued testifying to the effect he had added $250,000.00 as cash on hand, to the total net expenditures.

Loyd then identified cashier's checks which defendant had stated to Loyd he had purchased with funds from Alvin Bardin and used to pay the former shareholders of the Indianapolis Brewing Company, and they were admitted. On the basis of these exhibits Loyd raised the amount expended by defendant in 1946 for cashier's checks to $451,437.32.

This witness then reported his summation of what the evidence showed:

(h) on January 1, 1946, the credit balance of defendant's account with Daniel F. Rice was $15,413.59;

(i) on January 1, 1946, the credit balance of defendant's account with Gerstenberg Co. was $270.00;

(j) on December 31, 1946, defendant's Thomson & McKinnon account had a credit balance of $139,208.19; on January 15, 1947, it was $139,438.19; on March 31, 1947 it was $41,890.67; on May 27, 1947 it was $33,797.89;

(k) as of December 31, 1946, defendant had invested $23,000.00 in Central Air Parts, Inc., which remained the same through May 27, 1947;

(l) as of September 15, 1946, defendant had loaned Archie Bardin $10,000.00, which debt remained the same through May 27, 1947;

(m) the cost of the Indianapolis Brewing Company stock was $296,662.16 as of January 1, 1946 arrived at by deducting the $180,000 proceeds from the Eulberg and Denmark transaction from the contract price of $476,662.16 *but,* on December 31, 1946, and thereafter the cost basis of the stock was $476,662.16;

(n) as of December 31, 1946 the defendant had $250,000.00 cash on hand, as was so on March 31, 1947; by May 27, 1947 he had none;

(o) the account "L. P. Bardin for the acct of Alvin Bardin" had credit balances as follows:

(1) January 1, 1946	$ 150.00
(2) September 15, 1946	52,523.02
(3) December 31, 1946	40.32
(4) January 15, 1947	4,835.47
(5) March 31, 1947	110,861.57
(6) May 27, 1947	143,519.44

(p) on December 31, 1946 "L. P. Bardin for the acct of Alvin Bardin" was debited $80,000.00 and "Accounts Payable—Due Others" was credited a like amount, which amount remained in the latter account through May 27, 1947;

(q) the "summary concerning the total of the testimony" he had just "recited" was:

(1) as of January 1, 1946	$ 312,495.57
(2) as of September 15, 1946	608,269.95
(3) as of December 31, 1946	978,910.67
(4) as of January 15, 1947	983,935.82
(5) as of March 13, 1947	1,142,414.40
(6) as of May 27, 1947	916,979.39

(r) the account "Loans Officers" reflecting amounts due the Indianapolis Brewing Company, showed the following balances:

(1) as of January 1, 1946	$ 90,000.00
(2) as of September 15, 1946	179,300.00
(3) as of December 31, 1946	179,300.00
(4) as of May 27, 1947	179,300.00

(s) as of January 1, 1946, $171,197.90 was owed the former shareholders of the Indianapolis Brewing Company;

(t) "all of these liabilities" amounted to:

(1) as of January 1, 1946	$261,197.90
(2) as of December 1, 1946	179,300.00
(3) as of May 27, 1947	179,300.00

(u) the difference between assets and liabilities amounted to:

(1) as of January 1, 1946	$ 51,297.85
(2) as of September 15, 1946	428,969.95
(3) as of December 31, 1946	799,610.67
(4) as of May 27, 1947	737,679.39

(v) the difference between the assets minus liabilities as of January 1, 1946, and as of December 31, 1946, was $748,312.82;

(w) the defendant paid life insurance premiums of $3,334.20 during 1946 and suffered a non-deductible long term capital loss of $2,253.72, which when added to his income tax payment and the previous sum of $748,312.82 totaled $758,713.94;

(x) the defendant's 1946 income tax return showed a net income of $521,883.63.

Loyd revised his earlier statement as to the defendant's expenditures during the year 1946, eliminating therefrom another $25,450.00, leaving a "balance" of $831,441.15.

On cross-examination Loyd admitted that Alvin Bardin had reported the capital gain tax on gain realized from the sale of the Indianapolis Brewing Company stock to the several tavern owners. Although he (Loyd) knew the question of beneficial ownership of the Indianapolis stock was involved in this prosecution he had not investigated to determine who had received the final receivership dividend. He also testified that in his opinion the expenditures of the defendant represented taxable income, qualifying this however as based upon assumptions that (i) defendant had no prior accumulations, (ii) the account "L. P. Bardin for the acct of Alvin Bardin" belonged to defendant, and (iii) the money spent by defendant belonged to defendant. Furthermore, if there was any duplication, then the conclusion would be incorrect.

Loyd reduced the cost basis of the Indianapolis stock by $180,000.00 as of January 1, 1946, because the Eulberg and Denmark stock was returned to its prior owner in May, 1946. In his net worth computation, Loyd assumed that defendant owned the Indianapolis Brewing Company stock.

The government closed its case by recalling Earl P. Miller, an Internal Revenue Agent, and asking him the following hypothetical question:

> "* * assuming that the defendant in this case * * * had a net cash income for the taxable year, 1946, as shown by the income tax return for that year in the sum of $521,883.63, and assuming that he made expenditures in the amount of $831,441.15 in excess of his available declared resources, was taxable income received by the defendant during the year 1946, would there be a tax due and owing the United States by the defendant in excess of the amount of tax, if any, as shown on the defendant's income tax return for the year 1946?"

To this the defendant objected on the grounds that the "hypothesis" was not established by the evidence. The objection was overruled. Miller answered that upon a net income of $831,441.15 there would be a tax liability of $688,295.38 and that defendant had paid $31,757.55 on his 1946 income tax.

This record contains considerable evidence, but enough has been stated showing the complexity of the testimony and the resultant need for carefully guiding a jury. What is said in the *Holland* case, and which I quote further along in my opinion, becomes meaningful, here, only when related to the facts in Bardin's case. Having assembled some data embraced by this record, and about which defense and prosecution contest, I tabulated it as follows:

Assets and Liabilities—January 1, 1946

ASSETS	Government	Defendant
Cash on Hand		
Accounts Receivable:		
Archie Bardin		
Accounts Payable Due Others—Indianapolis Books		
Account Balances:		
"L. P. Bardin for Account Alvin Bardin"	$ 150.00	$ 150.00
Gerstenberg Co.	270.00	270.00
Daniel Rice Co.	15,413.59	15,413.59
Thompson and McKinnon		
Grain Sales, Dec. 28-Dec. 31, 1945		161,697.50
Stock:		
Indianapolis Brewing Co.(a)	296,662.16	476,662.16(a)
Eulberg & Denmark Breweries		
Investment:		
Central Air Parts, Inc.		
Totals—Assets	$312,495.75	$654,193.25
Sum of Differences		
LIABILITIES		
Total Liabilities	261,197.90	261,197.90
Final Net Worth:		
Based Upon Government Computations		
Based Upon Defendant's Argument		
Opening Net Worth:		
Per Government Computations	$ 51,297.85	
Per Defendant's Contentions		$392,995.35
Increase in Net Worth 1/1/46 to 12/31/46		
Net Differences in Computation of Assets—1/1/46 to 12/31/46		
Income Reported on Line 6, Form 1040, for Calendar Year 1946		
Difference Between Reported Income and Government Computation of Increase in Net Worth		
Count I, Indictment—Amount Charged as Bardin's Income for Calendar Year 1946		
Income Reported on Form 1040, for Calendar Year 1946		
Difference Between Reported Income and Income Charged in Count I		

(a) Computed by Government witness Loyd (T. R. 515). He arrived a
also testified to by witness McHale as being funds obtained from the Indiana
to the stockholders in payment of the—of part of the cost of the stock in th
(b) Red figures.

ANALYSIS OF EVIDENCE AND CONTENTIONS CONCERNING NET WORTH

		Net Worth—January 1, 1946		Assets-Liabilities, Dec. 31,1946			Net Worth—Dec. 31, 1946		Increase in Net Worth		Difference
ndant	Differences Plus or Minus	Government	Defendant	Government	Defendant	Differences Plus or Minus	Government	Defendant	Government	Defendant	In Net Worth Increase
				$250,000.00	$ 100,000.00	$(150,000.00) (b)					
				10,000.00	10,000.00						
				80,000.00	80,000.00						
150.00				40.32	40.32						
270.00				—0—	—0—						
,413.59				—0—	—0—						
				139,208.19	139,208.19						
,697.50	$161,697.50			—0—	—0—						
,662.16(a)	180,000.00(a)			476,662.16(a)	476,662.16(a)						
					180,000.00	180,000.00(a)					
				23,000.00	23,000.00						
,193.25				$978,910.67	$1,008,910.67						
	$341,697.50					$ 30,000.00					
,197.90				$179,300.00	$ 179,300.00						
				$799,610.67			$799,610.67		$799,610.67		
					$ 829,610.67			$829,610.67		$829,610.67	
		$ 51,297.85							51,297.85		
,995.35			$392,995.35							392,995.35	
									$748,312.82	$436,615.32	$311,697.50
	$341,697.50					$ 30,000.00					$311,697.50
									528,824.56		
									$219,488.26		
									$759,827.94		
									528,824.56		
									$231,003.38		

e arrived at this figure "* * * by taking the amount of $476,662.16 as testified to by the witness McHale and deducting therefrom the amount of $180,000.00 he Indianapolis Brewing Company used in connection with the acquisition of stock of the Denmark and Eulberg Company and in turn the funds being given stock in the brewery, the Indianapolis Brewing Company."

Several points of divergence between defense and prosecution are readily apparent from that analysis. The pith of certain evidentiary aspects is thus laid bare and, without weighing the evidence, I think a charge following the Holland standard is required.

I am well aware that the Holland court affirmed notwithstanding some challenges, launched by the Hollands against the district judge's charge, yet I think the pattern of instructions laid down by the Supreme Court is controlling in Bardin's appeal.

It clearly appears that the 42 instructions given below were inadequate, incomplete and incompatible with these views authored by the Holland (348 U. S. 121, 129) majority:

> "While we cannot say that these pitfalls inherent in the net worth method foreclose its use, they do require the exercise of great care and restraint. The complexity of the problem is such that it cannot be met merely by the application of general rules . . . . (citing) . . . . Trial courts should approach these cases in the full realization that the taxpayer may be ensnared in a system which, though difficult for the prosecution to utilize, is equally hard for the defendant to refute. *Charges should be especially clear, including, in addition to the formal instructions, a summary of the nature of the net worth method, the assumptions on which it rests, and the inferences available both for and against the accused* . . . ." (italics supplied)

To by-pass this quoted portion from the *Holland* case, handed down subsequent to Bardin's trial, predicated either upon sequence in adjudications, or failure to assert certain errors of which I now take cognizance would be inharmonious with fair play and sound administration of criminal justice. Respect for law is too easily lost among technical brambles. Though the instructions, given below, are unchallenged at this level, their inadequacy is indisputable by contrast with the *Holland* criteria. My course is simply consistent with Rule 52(b), Fed. R. Crim. P. 18 U. S. C. A. and should not be hereafter construed as opening the sluices for examination of other than plain errors adversely affecting substantial rights of defendants. I would delimit such holding to the situation now before us. As I analyze the assorted instructions it is clear there were

none summarizing the nature of the net worth theory, and no explanations of its assumptions were explained to the jury. The expenditure aspect of this case was also neglected. Certainly detachment and objectivity, both in feeling and thought, are difficult enough outside a courtroom without expecting an untutored jury to reach sound, fair and just conclusions in a complex case such as this unless they are supplied the correct legal benchmarks. It is difficult to see how these jurors could correctly determine if the evidence adduced, during trial, fitted within the framework of the offense described in the indictment.

Because the *Holland* court affirmed despite its own delineation of criteria for measuring jury changes in net-worth cases, fails, in my opinion, to furnish an escape-hatch for use in the instant appeal. I am unable to perceive why justice must be postponed "for future trials based on the net-worth theory." Awaiting decisions in *Holland* and its companion cases was, apparently, only an empty gesture on our part. I say this even after reading the Holland's petition for rehearing (denied 348 U. S. 932) grounded upon alleged defective instructions evaluated by the Supreme Court's own announcements in their case. It is idle to speculate why the petition was rejected. Yet the criteria was laid down in the *Holland* opinion and this defendant ought to have the benefit of our foresight in waiting as we did. I think we should have some hesitancy in flaunting such specific standards for jury instructions how ever the bellwether case was ultimately determined. My view, here, buttressed by the statement made in *Holland* v. *United States*, 348 U. S. 121, 127 (1954) which precedes the court's six point approach: "This leads us to point out the dangers that *must* be consciously kept in mind in order to assure *adequate* appraisal of the specific facts *in individual cases.*" (Italics supplied.)

Nevertheless, Mr. Justice Clark said in his prefatory portion of the *Holland* opinion (348 U. S. 121, 125), "careful study indicates that it (the net-worth method) is so fraught with danger for the innocent that the courts must closely scrutinize its use. One basic assumption in establishing guilt by this method is that most assets derive from a taxable source, and that when this is not true the taxpayer is in a position to explain the discrepancy. The application of such an assumption raises serious legal problems in the administration of criminal law."

Relevant, here, is one of the dangers from among the six mentioned by the *Holland* opinion:

> (A) ". . . the method requires assumptions, among which is the equation of unexplained increases in net worth with unreported taxable income. Obviously such an assumption has many weaknesses. It may be that gifts, inheritances, loans and the like account for the newly acquired wealth. There is great danger that the jury may *assume* that once the Government has established the figures in its net worth computations, the crime of tax evasion *automatically follows.*" (Italics added.)

When certain conduct of the United States Attorney is heaped upon these defective instructions I would be driven to ignore the realities of life to assume absence of any impact upon the jurors' minds. In its brief, the government argues that its counsel ". . . made a single, isolated reference to Alvin Bardin's refusal to testify which he (counsel) immediately mitigated by telling the jury to disregard what he said and draw no inferences from it." Falling back on defendant's failure to object or request an instruction, the prosecution would have us ignore this episode. Though its argument suggests some super-technical credit it reveals a robust disregard of human nature in the jury box. Moreover, defendant's case was interlaced with alleged financial relationships between the brothers Bardin. Consequently the government attorney's generous remarks only served to underscore the prosecution's point and cut ground from under the man on trial.

For this latter reason and, because I am opposed to "guessing" defendants into prison, especially when the Supreme Court has specifically instructed both appellate and trial courts in the handling of net-worth cases, I would reverse this judgment of conviction and order a new trial.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

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APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois

Friday, June 3, 1955
Before
Hon. Philip J. Finnegan, Circuit Judge
Hon. H. Nathan Swaim, Circuit Judge
Hon. Elmer J. Schnackenberg, Circuit Judge

The United States of America,
Plaintiff-Appellee,

No. 10953 vs.

Lawrence P. Bardin,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED.

APPENDIX C.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois

Friday, July 1, 1955

Before

Hon. Philip J. Finnegan, Circuit Judge

Hon. H. Nathan Swaim, Circuit Judge

Hon. Elmer J. Schnackenberg, Circuit Judge

The United States of America,
Plaintiff-Appellee,

No. 10953 vs.

Lawrence P. Bardin,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

APPENDIX D.

26 U.S.C. §145(a)(1952) provides:

"Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution."

APPENDIX E.

26 U.S.C. §145(b)(1952) provides:

"Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

APPENDIX F.

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1955

Lawrence P. Bardin
Petitioner,

vs.

United States of America

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 30th, 1955.

(Sgd) Sherman Minton
Associate Justice of the Supreme Court of the United States.

Dated this 26th
day of July, 1955.

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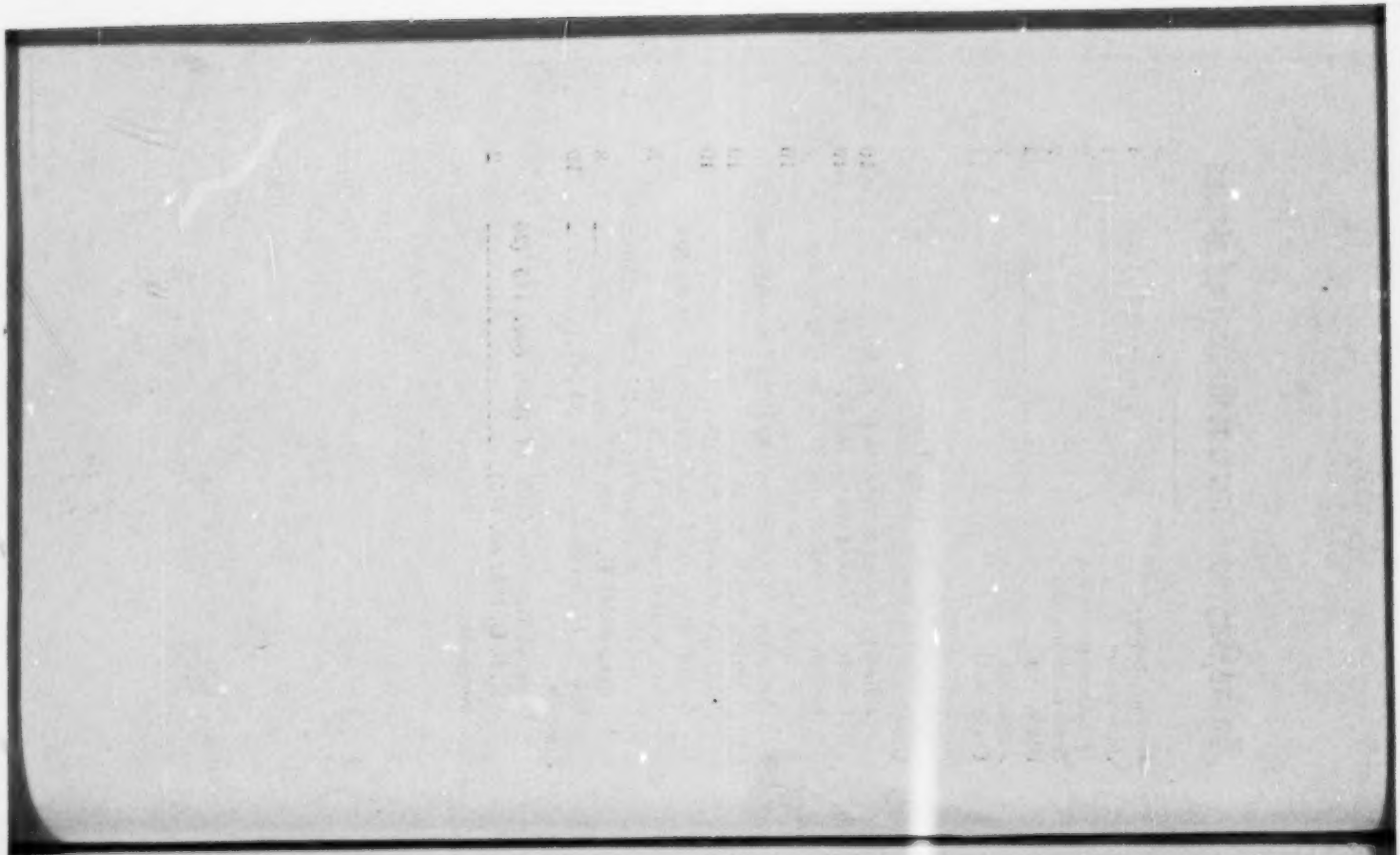

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 355

LAWRENCE P. BARDIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The majority and dissenting opinions of the Court of Appeals (Pet. App. A) are reported at 224 F. 2d 255.

JURISDICTION

The judgment of the Court of Appeals was entered on June 3, 1955 (Pet. App. B), and a petition for rehearing was denied July 1, 1955 (Pet. App. C). On July 26, 1955, Mr. Justice Minton signed an order extending the time for filing a petition for a writ of certiorari to August 30, 1955. (Pet. App. F.) The petition was filed August 29, 1955. The jurisdiction of this court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the trial court erred in permitting the Government to recall petitioner's brother as a witness after he once refused to testify on grounds of possible self-incrimination.

2. Whether Government counsel's remark in argument to the jury regarding the brother's refusal to testify, which remark was immediately withdrawn, deprived petitioner of a fair trial.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed. 145.)

STATEMENT

On September 12, 1952, petitioner was indicted in the United States District Court for the Southern District of Indiana. Count I of the indictment charged that petitioner wilfully attempted to evade and defeat a large part of his income taxes for the year 1946 by filing a fraudulent return in violation of Section 145 (b), Internal Revenue Code of 1939. Count II charged that petitioner wilfully attempted to evade the payment of his taxes in the amount of $639,841.28 for the year 1946 by concealing the nature and extent of his assets and their location, also in violation of Section 145 (b), Internal Revenue Code of 1939. (R. 2–3.)[1] After a jury trial petitioner was found guilty on both counts (Tr. 677) and sentenced to four years imprisonment on each count, the sentences to run concurrently (R. 35, 36). The Court of Appeals affirmed the conviction. (Pet. App. B.)

The sufficiency of the evidence, summarized in the opinion of the court below (Pet. App. A. 2–4), is not questioned by petitioner here (Pet. 3, 11–12) and the facts need not be repeated in

[1] The record is in four distinct parts which have been separately paginated. Reference to the District Court record will be indicated by "R."; to the testimony in the District Court, by "Tr."; to the reporter's typewritten transcript of summation and argument to the jury, by "Arg." The fourth part consists of proceedings before the Court of Appeals.

detail. Suffice it to say that petitioner admitted to investigating agents that he had received, and had used for his own purposes, large sums of cash representing over-the-ceiling payments for beer sold by the Indianapolis Brewing Company[2] (Tr. 497) which petitioner and his brother, Alvin, had purchased late in 1945 (Tr. 67–83, 357, 373); that petitioner filed no income tax returns whatsoever prior to 1942, and reported comparatively small amounts of net income in his returns for the years from 1942 to 1945, inclusive (Tr. 53–55), thus indicating that he could have had no very considerable accumulation of funds at the beginning of 1946 (cf. Tr. 521); and that, while petitioner filed a return for the year 1946 reporting net taxable income of $528,824.56 (Tr. 9–10), evidence of his increased net worth and of his expenditures demonstrated that his actual net taxable income was somewhere in the neighborhood of $800,000 (Tr. 502–505, 512–524). Furthermore, the evidence indicated that petitioner deliberately attempted to defeat the payment of the tax due on the amount of taxable income he actually did report. At the time payment was due in March 1947, he had $25,000 in a safe deposit box and $20,000 in an account with a broker (Tr. 27–30), and he also had $250,000 in a safe in the home of

[2] Numerous witnesses testified that they had made such over-the-ceiling payments to petitioner. (Tr. 146, 168, 174, 232, 243, 250, 295, 359, 374–375, 381, 385.)

another brother in California (Tr. 415–417). On May 25, 1947, the $250,000 in the safe was stolen under suspicious circumstances. (Tr. 307–312, 412–419.) On the following day petitioner mailed his return late reporting income of $528,824.56, together with a letter in which he stated that he could not pay any of the tax due because of the robbery. (Tr. 13–14.) The existence of the money in the safe deposit box and the broker's account was discovered subsequently, after petitioner, in response to an official demand for the tax due, had stated that he had no funds. (Tr. 25–30.)

Petitioner's brother, Alvin, his associate in the Indianapolis Brewing Company, was called as a Government witness. (Tr. 272.) He answered a number of preliminary questions, produced a quantity of records, and admitted having testified before the grand jury which returned the indictment in the present case. (Tr. 272–276.) The witness then refused to answer two questions on grounds of possible self incrimination. (Tr. 276.)

The prosecutor advised the court, after conference with Alvin Bardin's lawyer, that it had been decided to submit a list of questions for the witness's overnight consideration. (Tr. 277.) The court agreed and no objection was made by petitioner to this plan. Nor was any objection made when Alvin Bardin was recalled the following day. (Tr. 315.) The same refusal to answer was

made by Alvin Bardin to the series of questions which had been the subject of his overnight study. (Tr. 316–319.) The court then excused the jury and undertook to determine whether the witness's claim of privilege was well taken.[3] At no time did defense counsel object to any of these proceedings.

During his closing argument to the jury (Arg. 50) the prosecutor recalled the fact that Alvin Bardin had exercised his privilege under the Fifth Amendment in refusing to answer certain questions pertaining to the ownership of the Indianapolis Brewing Company. He then asked the question, "Why did he do that?" and added, "I will let you decide that." Counsel for petitioner objected to this line of argument and was sustained by the court. The prosecutor immediately asked the jury to disregard any reference he had made to the failure of the witness to testify. (Arg. 50.) Defense counsel did not move for a mistrial and did not request that the trial court instruct the jury to disregard the comment.

---

[3] With Alvin Bardin's lawyer and the United States Attorney participating, Alvin Bardin and Special Agent Loyd were interrogated (Tr. 320–343), the aim being to determine whether any criminal action was pending or could be brought within the statute of limitations against Alvin Bardin. It was concluded that a charge could be brought against Alvin for conspiracy to evade taxes though it was not likely. (Tr. 351.) Because of this conclusion the court reluctantly sustained the witness's claim of privilege. (Tr. 352.) He was then excused. (Tr. 352.)

ARGUMENT

1. Petitioner contends (Pet. 3, 12–13, 22) that both the trial court and the prosecutor knew that Alvin Bardin would invoke his constitutional privilege, and that the court erred in permitting him to be recalled to the stand. The record does not support such an argument.

There is nothing to indicate that the prosecutor knew the witness would claim his privilege when he was first called to the stand. In fact, the most logical inference is that the prosecutor was surprised, for Alvin Bardin admitted that he had already testified before the grand jury, he answered a number of questions and produced a quantity of records before invoking his privilege, and the prosecutor ceased his questioning after the witness had refused to answer two questions. Nor does it appear that the prosecutor knew that the privilege would be invoked when the witness resumed the stand next morning, for the witness and his attorney had been permitted to study the prepared questions overnight and there is nothing to indicate that the prosecutor had been informed that the witness would invoke his privilege as to any or all of them.[4] At any rate, petitioner at no time raised any objection to the questioning of his brother, and while it may well be that the

[4] Furthermore, there was still grave doubt at this point, as appeared from the trial court's subsequent examination of the witness out of the presence of the jury (Tr. 320–352), whether he was actually entitled to invoke the privilege.

witness's repeated refusals after he had been recalled (Tr. 316–320) ultimately gave reasonable cause to conclude that he would answer no more questions, petitioner's silence deprives him of the right to complain at this stage.

The worst that can be said of the prosecutor's conduct is that, without objection from the defense, he continued his questions after it had become clear that the witness would not answer. In a case involving quite similar circumstances, the Court of Appeals for the Second Circuit said (*United States* v. *5 Cases, etc.*, 179 F. 2d 519, 523, certiorari denied, 339 U. S. 963):

> Had this been done over the * * * [defendant's] protest, it might have been error serious enough to require reversal. As to that, we need not say; for here, the * * * [defendant] allowed the questions to go on without a whisper of objection and then moved for a mistrial. The victim of alleged prejudice cannot be allowed to nurse it along to the point of reversibility and then take advantage of a situation which by his silence he has helped to create.

Cf. *United States* v. *Hiss*, 185 F. 2d 822, 831–833 (C. A. 2), certiorari denied, 340 U. S. 948. In the present case, petitioner did not even move for a mistrial at the conclusion of the questions. He made no objection to them at all and is precluded from raising the argument on appeal.

Finally, the petitioner's failure to object to the questioning of Alvin Bardin may well have been

a calculated tactic, and not, as is now asserted (Pet. 10), the result of oversight on the part of trial counsel.[5] A great many of the assets which the Government ascribed to petitioner were held in the name of Alvin, and the defense argued with much vigor that the Government's evidence proved that Alvin, and not petitioner, had been guilty of tax evasion (Tr. 578–582, 592–594; Arg. 18–20, 30–35, 43–44). Under the circumstances Alvin's claim of self-incrimination was consistent with the theory of the defense, and trial counsel may well have concluded that it would be to petitioner's advantage to have Alvin make the claim in the jury's hearing.

2. Equally without merit is petitioner's contention (Pet. 3, 13–22) that he was deprived of a fair trial by the prosecutor's reference to Alvin Bardin's claim of self-incrimination during the closing argument to the jury. An objection to the remark was promptly sustained and the prosecutor immediately asked the jury to disregard what he had said. Defense counsel did not ask for a mistrial, nor did they ask the court to instruct the jury with respect to the incident. Under the circum-

[5] Nor were counsel, as is asserted (Pet. 15), powerless to prevent the interrogation of Alvin in the presence of the jury. They could have objected to the propounding of the further questions on the second day in the presence of the jury until the witness had indicated whether or not he would answer.

stances the trial court was entitled to conclude that the defense was satisfied that the prejudice, if any, had been removed by the ruling on the objection and by the prosecutor's prompt withdrawal of his remark. *Yoho* v. *United States,* 202 F. 2d 241, 244 (C. A. 9); *Claunch* v. *United States,* 155 F. 2d 261, 263 (C. A. 5); *Jenkins* v. *United States,* 149 F. 2d 118, 119 (C. A. 5), certiorari denied, 326 U. S. 721; *Heskett* v. *United States,* 58 F. 2d 897, 901 (C. A. 9), certiorari denied, 287 U. S. 643.

The case upon which petitioner chiefly relies (*Johnson* v. *United States,* 318 U. S. 189) is not controlling, for there the trial court *overruled* a defense objection to the prosecutor's comments on the defendant's invocation of the constitutional privilege in his own behalf and the prosecutor continued to argue the point at some considerable length. In addition, the *Johnson* case supports the Government's position here, since a new trial was not ordered by this Court for the specific reason that Johnson withdrew his objection to the comments of the prosecutor. Nor does the decision of the court below conflict with *Billeci* v. *United States,* 184 F. 2d 394, 398 (C. A. D. C.). In that case the trial court permitted the prosecutor to argue that the testimony of reluctant witnesses would have been harmful to the defense and specifically refused to instruct the jury to the contrary.

CONCLUSION

The decision below is clearly correct and presents no conflict of decisions or important question of law. The petition for certiorari should be denied.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.
H. BRIAN HOLLAND,
Assistant Attorney General.
JOSEPH M. HOWARD,
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Attorneys.

SEPTEMBER, 1955.

U. S. GOVERNMENT PRINTING OFFICE: 1955